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Canada

Labour Program

Information on

LABOUR STANDARDS

8 Unjust Dismissal

Part III of the *Canada Labour Code* (Labour Standards)

Division XIV – Unjust Dismissal of Part III of the *Canada Labour Code* provides a procedure for making complaints against a dismissal that an employee considers to be unjust.

The following questions, answers and case studies will be of interest to employers and employees under federal jurisdiction. Publication 1 – *Summary* of this series describes the types of businesses covered by the Code. It is available on the Government of Canada website at https://www.canada.ca/en/employment-social-development/services/labour-standards/reports.html.

1 Who is entitled to protection from unjust dismissal?

All employees, managers excluded, who have completed at least 12 consecutive months of continuous employment with the same employer and who are not covered by a collective agreement.

Employees should contact the Labour Program if they have questions regarding management status.

LT-035-06-18E

2 What can employees do if they feel that they have been unjustly dismissed?

a) They can request, in writing, a written statement from their employer giving the reasons for dismissal. The employer must reply within **15 days** after the request is made.

b) They can file a complaint alleging unjust dismissal at any Labour Program office no later than **90 days** from the date of the dismissal.

The complaint may be made by the dismissed person or by a representative, such as a lawyer. The complaint must identify the employee, state that the employee was dismissed, include the date of dismissal, and claim that the dismissal was unjust.

3 What is constructive dismissal?

The courts have held that the unjust dismissal provisions of Part III of the *Canada Labour Code* also apply to "constructive dismissal". In a constructive dismissal, the employer has not directly fired the employee, but has failed to comply with the contract of employment in some major respect or has unilaterally and substantially changed the terms of employment or expressed an intention to do either of these.

In such a case, the employee must clearly indicate within a short period of time, that he or she does not accept the new conditions of employment. Often the employee feels compelled to resign rather than accept the new conditions of employment. This may constitute constructive dismissal.

Not all cases of an employee quitting amount to "constructive dismissal". Seek more information from any Labour Program office if you think this may apply to you.

4 Who will normally deal with the complaint?

Initially, an inspector will try to help the parties settle the complaint. The inspector acts as a mediator, trying to negotiate a settlement that is acceptable to both parties. Settlement might consist of a monetary payment or changes to the dismissed employee's employment record. The majority of unjust dismissals are resolved at this stage.

If the inspector is unsuccessful, the dismissed employee can request that the complaint be referred to an adjudicator.

5 Does the complaint automatically go to adjudication?

No. The Minister of Labour decides whether or not to appoint an adjudicator.

If an adjudicator is appointed, the date is set for a hearing at which the employer and employee can present evidence. With few exceptions, it is up to the employer to prove that the dismissal is justified.

The procedures used at an adjudication hearing are less formal than those in a civil court. The rules of evidence are relaxed to ensure that all relevant material is available to the adjudicator. Parties are free to call on witnesses and choose whether they will be represented by a lawyer. After hearing all the evidence, the adjudicator must make a decision on the justness of the dismissal and determine the remedy entitlement.

6 What are the powers of an adjudicator?

An adjudicator is empowered to consider the complaint and render a decision which is binding on both parties.

Where an adjudicator finds the dismissal to be unjust, the employer may be ordered to:

a) reinstate the employee with or without compensation for lost wages;

b) pay compensation for lost wages, without reinstating the employee; or

c) do anything that is equitable in order to remedy any consequences of the dismissal; e.g., clear an employee's record of any references to the dismissal, pay legal costs, etc.

7 Can an adjudicator's decision be appealed?

No. The decision of an adjudicator is final. It cannot be appealed in court. However, it may be subject to an application for review by the Federal Court of Canada under certain limited circumstances.

8 Who pays for the adjudicator?

The Labour Program pays for the adjudicator, but the employer and the employee are responsible for the cost of legal counsel if they choose to be represented by a lawyer.

9 Is there a distinction between dismissals, terminations or lay-offs?

Dismissals and permanent terminations may be the result of disciplinary actions which can be found to be just or unjust through the procedure described in the Code. However, temporary lay-offs or permanent terminations stemming from economic considerations such as lack of work or discontinuance of a function cannot be appealed under the Code. This does not mean that an employer can fire an employee and then claim that lack of work or a change in work assignments is the reason. Where an employee believes that there was no justification for the termination, he or she may file an unjust dismissal complaint with any Labour Program office. Then it is the employer's responsibility to demonstrate that the termination actually was for valid economic reasons.

10 Does the adjudication process prohibit the employee from pursuing a civil remedy against the employer?

Filing a complaint under the *Canada Labour Code* does not prohibit an employee from pursuing a civil remedy. Adjudicators and the courts have concurrent jurisdiction in this area. Although it seldom occurs, an employee may file civil action against his or her employer for wrongful dismissal while the Department investigates the unjust dismissal complaint.

I. Case studies

The following case studies are based on actual unjust dismissal complaints. Only the names have been changed. The case studies provide examples of how this legislation has been applied and explained in the past.

Case 1

Lack of work/discontinuance of a function. Special issue: Employer's selection criteria to lay off an employee.

Peter Wallace had been employed for 25 years by a federal Crown corporation when he was permanently laid off with six months' severance pay. The employer said the termination was necessary because budget constraints had forced the corporation to downsize.

Peter thought that another employee at the same level but with less service should have been laid off first. He also heard that a new employee had been hired to do some of his work.

Peter made a written complaint to the Labour Program claiming the agency had unjustly dismissed him.

The inspector handling Peter's complaint interviewed the managers who made the termination decision. They provided copies of Peter's employment record which showed negative evaluations and that several interviews had not caused significant improvement. They also said that due to budget problems the work of Peter's department had been cut by more that two-thirds after his lay-off. Finally, they argued that Peter received a generous severance package that took into account his position and years of service.

The two parties could not agree, and Peter requested the appointment of an adjudicator.

The adjudicator heard evidence from witnesses and arguments from lawyers for both sides. Peter's lawyer argued that he had been dismissed for disciplinary reasons without the benefit of any system of progressive discipline. He said that the fact that a new employee was carrying out duties similar to Peter's showed that the job had not been eliminated and that budget problems were not the real reasons for Peter's dismissal.

The employer's attorney argued that the similarity between the responsibilities of the two was minor and had been the result of a reorganization caused by the corporation's or agency's budget constraints and general workforce reduction. The employer also said that they chose to keep the other employee because of his superior work performance.

Adjudicator's Decision

After examining the facts, the adjudicator rejected Peter's complaint. He concluded that Peter was, in fact, terminated due to discontinuance of his position.

Case 2

Alleged reason for dismissal: Poor work performance. Actual reason for Dismissal: Discrimination. Special issue: Double jurisdiction (other redress).

Kim Draper had worked for two years as a camera operator at a small television station when she was fired for "poor work performance". This was based on several evaluations of her work by her supervisor.

She complained to an inspector. Kim explained that she believed her supervisor was "from the old school" and didn't consider women competent to carry out technical jobs like that of camera operator. She gave examples which indicated to the inspector that she might have been the victim of systematic discrimination by the supervisor.

Outcome

The inspector explained the role of the Canadian Human Rights Commission (CHRC). Her complaint was then referred to the CHRC, which determined that discrimination was the cause of her dismissal. The CHRC subsequently negotiated a settlement with the employer.

What determines whether a dismissal is just or unjust?

In reaching their decisions, adjudicators apply well established principles of discipline in the work place to the circumstances of each case. If these principles have been followed by the employer in deciding to dismiss, then the adjudicator may find that the dismissal was just. If, on the other hand, these principles have been violated to the disadvantage of the then employee, the dismissal would likely be found unjust. Sections II to V of this publication describe the principles involved.

II. Key Factors in the Employer's Decision to Discipline

The Labour Program views dismissal as the last and most serious step an employer can take in the disciplinary process. Dismissal can be justified only in those terms. It is useful to understand an employer's usual motivations for taking disciplinary action.

The objective of disciplinary action is to correct inappropriate behaviour in the work place. Personnel management experts have identified three general grounds for disciplinary action: **incompetence, negligence and misconduct**.

Incompetence means that a person does not have the abilities or skills to perform the assigned duties.

Negligent employees may have the required skills but they seem to ignore some of their duties or are careless in performing them.

Every work place has rules to make its operations efficient and safe.

Misconduct means that these rules have been broken. Although an employee may break these rules without causing a direct or immediate impact on the output of the organization, the attitudes of employees and customers may be negatively affected. Thus, disciplinary actions may be justified.

A number of factors should be considered before an employer decides to dismiss for disciplinary reasons. There are some cases where the violation of a work place rule or the degree of incompetence or negligence is so great that the employer is justified in dismissing an employee immediately. However, an employee's misbehaviour usually has relatively minor consequences and is easily corrected. Employers should use a system of progressive and corrective discipline for misconduct which permits employees to learn from their mistakes and improve their performance. Dismissal is normally the last resort in such a system.

Factors considered by employers when disciplining an employee

Employers should take into account eight factors before taking disciplinary action:

a) Seriousness of the problem
Did the action of the employee have major or minor consequences for the employer? Was the employee aware of the consequences?

b) Frequency of the problem
Is this type of misbehaviour common among other employees?

c) Time since last infraction
Does the employee have a history of this type of behaviour, or was the incident a first offence?

d) Employee's work history
Has the employee performed his or her job satisfactorily in the past?

e) Extenuating or mitigating factors
Was the employee facing pressures such as personal problems or provocation which may have led to the improper behaviour?

f) Degree of orientation
Were the work place rules clearly explained? Had the employee been informed about the employer's expectations concerning job performance?

g) History of organization's disciplinary practice
Has the employer dealt consistently with similar offences in the past?

h) Implications for other employees
What effect did the employee's action have on the attitudes or actions of colleagues?

When an incident occurs which the employer believes warrants disciplinary action, it is the employer's responsibility to investigate the circumstances fully. During this investigation, the employee should be given every opportunity to provide his or her view of the incident. No disciplinary measure should be started without full knowledge of the facts. This is especially true when dismissal is being considered. Adjudicators often use these considerations when deciding whether a dismissal was justified. An example of this kind of situation is given in Case 3.

After the appropriate disciplinary measure has been chosen, the employee should be informed of the action, the reasons for it and the changes in behaviour which are expected.

It has been said that a good system of corrective discipline is like a "hot stove". Those approaching it are warned of its heat, and its effect on those who touch it is immediate, consistent, and impersonal. The same principle applies to dismissal, the most severe form of discipline.

Case 3

Unsatisfactory work performance. Special issues: Degree of orientation and employer's disciplinary practices not followed.

Diane Zubiak, a clerk with a federal Crown corporation, worked for two years in a small remote office until she was dismissed. In the dismissal letter, the employer said the reason was Diane's "unsatisfactory work performance". Diane wrote to the nearest Labour Program office stating she believed she had been unjustly dismissed. She then met with an inspector. She told the inspector that she had been asked to do work for which she had not been trained. As well, she had to do this work while she was alone in the office with no one to answer her questions. She also thought her supervisor disliked her.

The inspector tried to get the supervisor's side of the story, but she refused to discuss the case. The inspector contacted a personnel officer at the employer's regional office and reviewed the status of Diane's complaint. The personnel officer investigated and found that the corporation's standard disciplinary practices had not been followed in Diane's case.

Outcome

Arrangements for Diane's reinstatement with full back pay were promptly made.

III. Employee Infractions and Progressive Discipline

Most cases of misbehaviour on the job are not serious enough to warrant dismissal. When misconduct is relatively minor, the employee should be subject to a system of progressive, corrective discipline. This provides him or her the opportunity to change behaviour which the employer perceives as unsatisfactory.

Progressive discipline can be used to improve employee's job performance or enforce rules in the work place. Poor attendance, tardiness, and insubordination are three common violations of work place rules which lead to progressive discipline. Employers may also use progressive discipline to correct an employee's poor attitude towards his or her work or other employees.

Generally, systems of progressive discipline have several steps which may include a verbal warning, a written warning, and suspension. In cases where poor job performance is the problem, some employers demote unsatisfactory workers into less responsible positions. Dismissal should be considered only where employees fail to respond to these measures by improving job performance and avoiding rule violations.

When a complaint of unjust dismissal under the *Canada Labour Code* is placed before an adjudicator, the principle of progressive discipline has great impact on the settlement process. It is not enough for the employer to have a system of progressive discipline on paper. Because each employee has the right to be treated equally, progressive discipline must be applied consistently (to each employee) for each infraction or offence.

To find that a dismissal is just, the adjudicator must be satisfied that the employee's record shows a pattern of unacceptable behaviour leading to a "culminating incident" or final incident which resulted in the dismissal. Many employers use this concept to support the decision to dismiss. Without a culminating incident, which itself justifies discipline, an employee cannot be dismissed on the grounds of his or her work record alone. Moreover, the employer must have warned the employee that the previous misconduct was not acceptable and that further inappropriate behaviour could lead to dismissal.

A well documented personnel file is one tool which employers can use effectively before an adjudicator. A record should be kept of the disciplinary history and performance appraisals of each employee. The file should include copies of appraisals, dates and details of infractions, comments of supervisors, disciplinary action taken, the remedial efforts made by the employee, and correspondence between the employer and employee concerning work performance and misconduct.

Examples of this kind of situation are given in Cases 4, 5, and 6.

Case 4

Unsatisfactory work performance. Special Issues: Competent before transferred to new position. Employer's disciplinary policy not applied.

George Brown had worked for the same company for almost five years. He was dismissed for an "inability to meet performance standards required". George filed a complaint with the Labour Program claiming that his dismissal was unjustified.

George and his employer were unable to settle, so an adjudicator was appointed.

The evidence presented to the adjudicator showed that during the first four years, George's work performance was entirely satisfactory. Then he was moved into a new position with significant new challenges. George was never formally evaluated in the new position and never received any formal notice that his work was unsatisfactory. Ten months after beginning the new job, he was fired.

In George's defence, the adjudicator was provided with the employer's own guidelines for dealing with unsatisfactory job performance. The policy described a system of progressive discipline which included verbal and written warnings, interviews to discuss the employee's performance and to develop a program for improvement, and the setting of a probation period of up to six months during which an employee could improve his or her performance.

Adjudicator's Decision

The adjudicator concluded that the employer's policy of progressive discipline had not been followed in George's case and he had been unjustly dismissed. As George had not sought reinstatement, the adjudicator ordered the employer to pay the employee six (6) months salary.

Case 5

Insubordination, lack of interpersonal skills. Special issues: Culminating incident. Progressive discipline applied. Aggravating factors.

Colin MacDonald, a computer technician, had worked for a communications firm for 18 years. He was often required to work with colleagues on major projects. In the early years, Colin's respected technical abilities had resulted in promotions. However, his advancement was slowed by poor interpersonal skills and negative attitude toward some of his fellow workers. After refusing a direct order of his supervisor to do work outside his regular duties, Colin was dismissed.

Colin sent a written complaint to the Labour Program that he had been unjustly dismissed. The inspector found that neither of the parties was interested in compromising to reach a negotiated settlement. The complainant requested the appointment of an adjudicator.

The employer's lawyer presented a large number of personnel appraisals showing that Colin's lack of interpersonal skills had long been a concern. As well, they showed that Colin had been provided with special training to improve but after a few months of improvement his performance would slip again.

The employer also showed that in the four years preceding the culminating incident, Colin had been suspended twice. One two-day suspension for insubordination and one five-day suspension for leading a group which made sexist remarks to another employee in the cafeteria.

Colin's lawyer said the employer had "singled out" Colin because other employees who had made sexist remarks were not suspended. He argued that Colin's refusal to follow a direct order could not be seen as a culminating incident because it happened once and was not part of a pattern of behaviour. The lawyer claimed that the supervisor had been provocative when he ordered Colin to do work which was not part of his regular duties.

Colin stated he had participated in the group accused of making sexist remarks but said they were joking and had done no harm. He also said he had refused the supervisor's order because he had other work which was pressing.

Adjudicator's Decision

The adjudicator found Colin's dismissal justified. He had been subject to a system of progressive discipline and, in addition to his suspensions, he had received many verbal and written warnings concerning his interpersonal skills. The firm provided him with opportunity and training to improve, but he did not. He pointed out that Colin had been suspended for sexist remarks because he was the leader of the group. While others had admitted their actions and felt regret for them, Colin continued to deny that he had done anything wrong. Finally, in refusing to obey the order of his supervisor, Colin had provided the culminating incident which led to his dismissal.

Case 6

Violation of company rules. Culminating incident. Special issues: Progressive discipline system. Appraisals show improvement after every disciplinary action taken.

Bob Saunders, a driver for an interprovincial trucking firm, had been dismissed after four years. In the letter of dismissal, the employer stated that Bob had violated company rules many times and the culminating incident was an act of insubordination.

Bob filed a written complaint with the Labour Program a week later. He claimed he had been fired without cause and without any notice or warning.

The inspector met with the manager of the firm who provided well documented records which showed Bob had been disciplined frequently for misconduct, including breaking the firm's rules and regulations and for insubordination. Most had happened in the first two years of his employment with the firm. Recent appraisals by his direct supervisors had noted improvement in Bob's attitude and work performance.

After reviewing the file, the inspector advised the employer that Bob's improved record during the last two years showed that he had responded well to progressive discipline. This would make it difficult to argue that Bob's refusal to obey an order was a culminating incident.

Outcome

The employer later advised the inspector that he would reinstate Bob but only if Bob was willing to go on probation for a year. Bob agreed to the manager's terms and was back at work two weeks later.

IV. Major Misconduct Resulting in Instant Dismissal

Some offences are grounds for immediate or instant dismissal rather than progressive discipline. These offences include gross misconduct such as theft or falsification of records, wilful destruction of an employer's property, or endangering the safety of fellow employees through incompetence or negligence.

Employees have also been dismissed for activities which place them in conflict of interest, such as setting up a business that competes directly with their employer. Instant dismissal can also be justified for actions outside the work place. This may include involvement in criminal activity that reflects badly on the employer or damages, beyond repair, the employer's trust in the employee.

Misconduct that may justify instant dismissal differs from one situation or industry to another. What may be a major offence in one type of business may not be considered as serious in another. For example, a criminal conviction for theft may not be seen as seriously by an industrial employer as it would by a financial institution. The falsification of production records is considered more serious in situations where productivity bonuses are paid to employees. Drinking on the job or coming to work intoxicated is most serious when the employee's actions could endanger the safety of others.

The seriousness of any offence also depends on the employee's level of responsibility and the loss incurred by the employer as a result of the employee's action. Therefore, in deciding whether the employer was justified in immediately dismissing the complainant, adjudicators under the *Canada Labour Code* must first determine the seriousness of the misconduct.

Examples of this kind of situation are given in cases 7 and 8.

Case 7

Misappropriation of customer's funds. Falsifying employer's records. Failure to report irregularities.

Lise Roy and Val Nelson worked for a financial institution. Lise was the chief administrative officer and Val was her assistant.

Both women had worked for their employer for about eight years when they were dismissed for misappropriation of customer funds, falsifying records and failure to report irregularities. The two admitted they had been part of a scheme to cover tellers' shortages from the funds of a particular customer. However they believed that they were being unfairly treated because the tellers involved had received only written warnings. They wrote separately to the Labour Program claiming unjust dismissal.

In both cases the employer was unwilling to negotiate and an adjudicator was appointed.

The facts were clear. There had been a chronic problem with shortages in teller's cash balances. A "slush fund" under Lise's control was set up to cover shortages tellers might have. While Lise controlled that fund, Val actively participated in running it. This continued for several months, until the manager uncovered the scheme. Following a thorough investigation, Lise and Val were fired.

In both cases, it was argued that the dismissals were excessively severe compared with the written warnings received by the tellers involved. The employer argued that the tellers were only following the instructions of their two superiors. The disciplinary action taken against Lise and Val was stiffer because they had set up the fund and had violated the trust the employer placed in them as supervisors.

Adjudicator's Decision

The adjudicator dealt with each case separately. It was decided that Lise's dismissal was just. She had initiated the plan and was the senior person involved. The adjudicator also said that Lise showed "little appreciation for the seriousness of the offence she had committed". Her actions were so destructive to the employment relationship that the employer had no alternative but to dismiss her.

The adjudicator found that Val had been unjustly dismissed because she had been intimidated by Lise into participating in the scheme. Furthermore, Val had co-operated in the employer's investigation and admitted her wrongdoing. Her penalty was changed from dismissal to a three month suspension without pay.

Case 8

Loan-sharking. Criminal behaviour. Special Issues: Private life vs. work misconduct. Damaged employer's image. Conflict of interest. Summary dismissal.

An employee of a large transportation company for 25 years, Ken Taylor was a middle manager when he was arrested by police for loan sharking. He was found guilty under the *Criminal Code* and fined $2,000. His employer then dismissed him. Ken had been loan-sharking with several other employees and some of the group's "clients" were also company employees.

After his arrest it was discovered that Ken had falsified employee records and passed confidential information about employees to people outside the company.

Ken wrote to the Labour Program claiming he had been unjustly dismissed. He said that his association with the group had ended several months before he was arrested. He believed that because of his excellent work record, progressive discipline should have been applied. As well, he thought the company had fired him in response to pressure from employees who wanted to get back at him.

The employer argued that Ken had admitted his criminal actions. Although they happened outside working hours, those actions conflicted directly with his responsibilities in the organization. During the internal investigation, Ken had not been co-operative or honest. The employer said the trust required in the employer-employee relationship was destroyed and Ken had been dismissed.

Adjudicator's Decision

Ken's criminal activity was found to be related to the work place because it involved his co-workers. He had also passed on confidential information to people outside the work place for his own personal gain. The adjudicator ruled that his dismissal was fully justified.

V. Aggravating and Mitigating Factors Considered by Adjudicators

Whether a dismissal results from a series of minor infractions or a major offence, it is generally accepted that there are two types of facts, aside from the strict facts of the case, that play a role in determining the appropriate disciplinary action, especially when an action as serious as dismissal is being considered.

Adjudicators refer to **"aggravating"** and **"mitigating"** factors to determine the type and severity of disciplinary action appropriate for the offence, as well as whether or not the dismissal is just. These elements are taken into consideration when adjudicators evaluate the seriousness of the offence and the corrective measures imposed by the employer. For example, the fact that the misconduct was an isolated and unpremeditated act may mitigate the seriousness of the offence. On the other hand, the fact that the offence had been planned will be considered as an aggravating factor.

Many aggravating and mitigating circumstances have been taken into account by adjudicators to determine whether the disciplinary action taken was appropriate for the offence committed and whether dismissal was justified for that infraction.

The following factors have been considered by adjudicators:

Aggravating Factors	Mitigating Factors
• Misconduct was intentional and premeditated.	• Misconduct was beyond control or dependent on other factors such as provocation.
• Employee refuses to accept responsibility for his or her actions.	• Misconduct was committed on the spur of the moment or as a result of an emotional impulse.
• Misconduct is unacceptable for the type of business involved.	• There was a lax and permissive atmosphere at the work place.
• Behaviour irreparably broke the bond of trust that is essential in an employer-employee relationship.	• The offence was not committed during working hours.
• Employee was fully aware that such misconduct was unacceptable.	• The misconduct did not damage the employer's image.
• There was a culminating incident.	• The employer had condoned the employee's behaviour in the past.
• Employee did not improve after corrective action taken by the employer.	• The penalty imposed was inappropriate for the offence committed.
	• The employee admitted wrongdoing.
	• The previous disciplinary and work record of the employee was good.
	• The employer's rules of conduct had not been uniformly applied.
	• The company had not allowed the employee to explain his or her actions.
	• Employee's actions were as a result of an error, a misunderstanding or a lack of training.
	• Allegations were not known to the employee. Infraction was an isolated incident.

Examples of this kind of situation are given in Cases 9 and 10.

Case 9

Misappropriation of customer's funds. Dishonesty. Special issues: Aggravating factors. Concept of honesty and trustworthiness in employment relationship.

Mark White had been a driver for an interprovincial courier for ten years when he was dismissed for misappropriating a customer's funds. He felt that dismissal was too harsh a penalty and filed an unjust dismissal complaint with the Labour Program.

The parties failed to reach a settlement and the complainant requested the appointment of an adjudicator. An adjudicator was appointed.

The employer's evidence showed that Mark had not handed in payments totalling $45.00 that he had received from customers, as required by company policy. Every employee knew about this policy and in similar cases of theft the penalty had been dismissal. The employer held that the policy of dismissal was justified by the importance of the company's integrity, the sporadic nature of courier supervision, the values of items entrusted to drivers, and the image of trustworthiness the employer had to maintain.

The complainant admitted that he had received the payments and had offered to pay back the employer. Considering his age (58 years), and a theft of only $45.00, he suggested that a lesser penalty would have been more appropriate.

Adjudicator's Decision

After hearing the evidence, the adjudicator commented that dismissal is no longer an automatic penalty in cases of dishonesty. In this case, when employee integrity was an absolute requirement, this type of misconduct is an aggravating factor.

The adjudicator accepted the employer's version of the facts and considered the following factors:

a) the offences were committed over a short period of time;

b) the complainant did not reimburse the money despite having several opportunities to do so; and

c) he did not admit his offences at the hearing.

Given the gravity of the offence, the complainant's age was not a mitigating factor. The adjudicator concluded that the dismissal was justified.

Case 10

Incompetence. Special Issues: Highly competent before promotion. Application of corrective discipline approach. Personality conflict. Mitigating factors.

Jean Scott worked at a branch of a financial institution for five years. In annual performance appraisals her work was rated as competent for three years and highly competent in her fourth year. She was promoted to head teller. During the first four years her appraisals also noted various areas for improvement such as her attitude toward her work, timeliness, and balancing of her cash. The appraisal showed that Jean made an effort to respond to these suggestions.

After nine months as head teller, Jean's immediate supervisor rated her performance as "low competent". The written appraisal was critical of Jean's attitude and her lack of co-operation with her peers and her supervisor. It indicated that demotion was being considered.

A letter from her manager said that she was being placed on "corrective supervision status". This meant work attendance, cash balances, and her "adherence to other work place procedures" would be closely scrutinized. If, at the end of two months, her performance was not rated as "competent", Jean would be demoted.

About five weeks into the "corrective supervision" period, Jean had an unexplained cash shortage of $2,000. After an internal investigation by the employer, Jean was dismissed because of her "overall job performance". She submitted a complaint to the Labour Program saying she had been unjustly dismissed.

When the parties could not reach an agreement, an adjudicator was appointed.

Adjudicator's Decision

After hearing several witnesses, the adjudicator pointed to a number of mitigating factors. First, there was no evidence that Jean's cash shortage was anything more than a gross error on her part. Second, Jean had an obvious personality clash with her immediate supervisor which may have accounted for her poor work attitude. Third, the employer had placed Jean under "corrective supervision" for two months, and had stated that she would be demoted if her performance was not rated competent. Instead, Jean had been fired six weeks into the period. Fourth, Jean had a good work record and had responded to suggestions made by her superiors in the past.

In light of the above circumstances, the adjudicator found Jean's dismissal to be unjust. Jean was reinstated but she was demoted to teller.

Mitigation of damages by employee

It is the complainant's obligation to reduce his or her losses. If the dismissed person did not make reasonable efforts to find other employment while awaiting the adjudicator's decision, the adjudicator may reduce the size of the award. If, on the other hand, the unjust dismissal unnecessarily imposed a severe hardship on the employee, the award may be higher than normal.

Criteria used by adjudicators to arrive at remedy (amount of award)

The following elements are taken into consideration when adjudicators calculate the amount complainants are entitled to:

- type of position held, experience and responsibilities;
- age of complainant;
- length of service with employer;
- degree of attempt by employee to mitigate losses;
- affect of dismissal on complainant (unnecessary hardship);
- serious drawbacks dismissal would have on career development;
- aggravating factors contributed by the employee;
- mitigating factors contributed by the employee;
- prospect of alternative employment (availability of work);
- harsh and unfair manner in which dismissal took place;
- dedication, perseverance and hard work by employee; and
- employee's clean disciplinary record.

An example is given in Case 11.

Case 11

Lack of interpersonal skills. Unsatisfactory work performance. Special issues: Mitigation attempts by complainant. Employer's management techniques.

Henry Journeau had worked for the same employer for six years when he was transferred to an administrative position in a regional office. Henry did not like the transfer since he saw the move as a demotion. His superiors, however, believed Henry's poor interpersonal skills were a weakness that limited his potential. The new position offered an ideal opportunity for Henry to correct that weakness.

From the beginning, Henry had difficulty in his new job. Staff were quickly alienated by Henry's insensitive handling of their concerns and his intimidating manner. He adopted a practice of writing notes to subordinates, some located only a few feet from his desk, addressing them by their job titles rather than using their names.

Henry's supervisors warned him, both in interviews and in writing, that he would be suspended or demoted if his approach to supervision was not improved. Henry refused to accept the validity of any of the complaints. A few days after receiving the last warning, Henry was dismissed. The employer had decided there was no chance of Henry improving his performance.

Adjudicator's Decision

The adjudicator found Henry's dismissal unjust. Although Henry's work performance could have justified dismissal, the employer's management techniques had been faulty in three major areas. First, Henry's immediate supervisor was not supportive. In fact, some of the supervisor's actions had been an obstacle to Henry improving his performance. Second, Henry was told that continued poor performance would lead to suspension or demotion, not dismissal. Third, no "culminating incident" occurred in the several days preceding the dismissal.

While Henry's dismissal had been unjust, there were considerations which reduced the compensation due him since Henry still refused to admit that he was ever at fault. Henry's attitude was "everyone else is wrong and I am always right". Furthermore, Henry had done little to find another job after his dismissal.

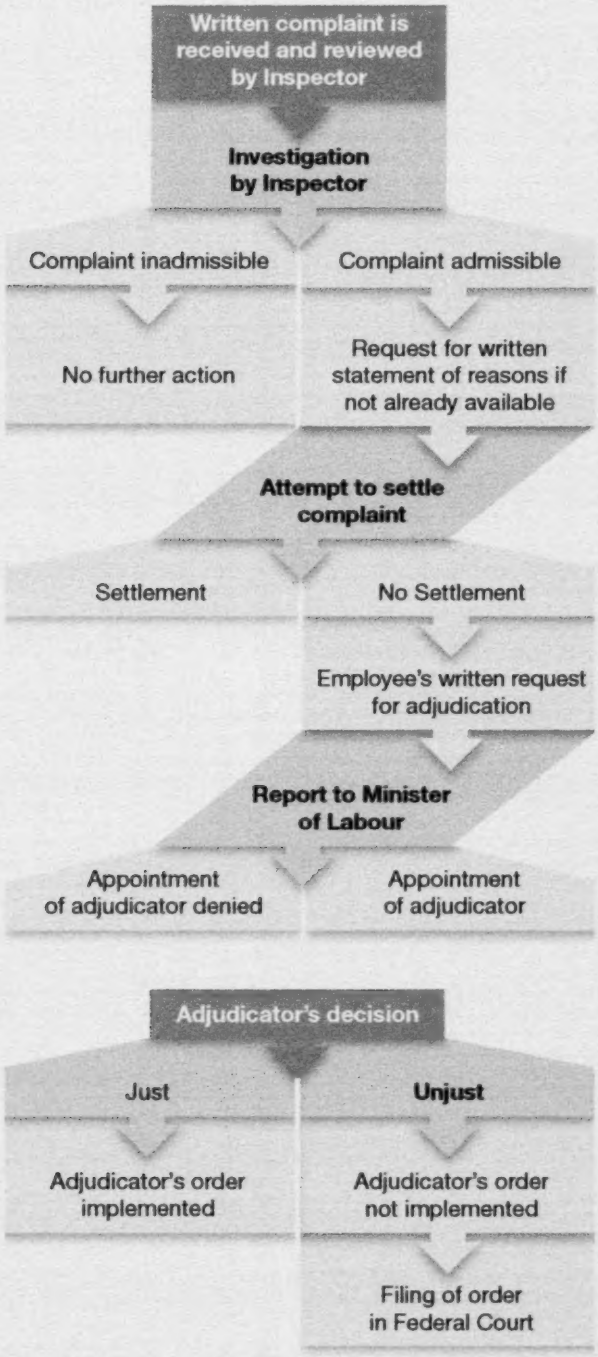
The adjudicator ordered the employer to pay Henry seven (7) months' salary and provide services of a career counsellor to a maximum of $1,500.

Conclusion

In the material you have just read, we have covered a range of situations in order to answer questions from both employers and employees on this topic. These cases demonstrate that an adjudicator has wide latitude in providing a remedy when dismissals are found to be unjust.

Overview of the Unjust Dismissal Process

Part III of the *Canada Labour Code*



This publication is provided for information only. For interpretation and application purposes, please refer to Part III of the *Canada Labour Code* (Labour Standards), the *Canada Labour Standards Regulations*, and relevant amendments.

Please note that Part 4 of the *Department of Employment and Social Development Act* provides that personal information may be made available to individuals upon their request in writing.

Information about these provisions may be obtained from the Labour Program by calling toll free at 1-800-641-4049, by visiting the website at ***https://www.canada.ca/en/employment-social-development/programs/employment-standards/federal-standards.html*** *or by submitting your questions or comments through the Labour Program* ***Contact Us*** *form.*

Information on Labour Standards - 8 UNJUST DISMISSAL

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PDF
Cat. No.: Em7-1/8-2018E-PDF
ISBN: 978-0-660-26715-9

ESDC
Cat. No.: LT-035-07-18E